

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA  
*ex rel.* EDMUND G. BROWN, JR., K  
ATTORNEY GENERAL OF THE STATE OF  
CALIFORNIA,

No. C 07-02055 JSW

Plaintiff,

v.

**ORDER GRANTING MOTION  
FOR VAUGHN INDEX**

ENVIRONMENTAL PROTECTION  
AGENCY; NATIONAL HIGHWAY  
TRAFFIC SAFETY ADMINISTRATION;  
DEPARTMENT OF TRANSPORTATION;  
and OFFICE OF MANAGEMENT AND  
BUDGET,

Defendants.

Now before the Court is the motion filed by Plaintiff, the People of the State of California, by and through Plaintiff Edmund G. Brown Jr., Attorney General of the State of California ("Plaintiff") for an order requiring Defendants, Environmental Protection Agency, National Highway Safety Administration, Department of Transportation and Office of Management and Budget, ("collectively "Defendants") to provide a detailed justification for the allegations contained in their answers and in their earlier administrative denials that the requested documents are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, *as amended*, ("FOIA"), together with itemized indices of the documents withheld that are the subject of this suit, indicating in detail, with respect to each document or segregable portion thereof, the nature of the information contained in it and the justification for

1 withholding it. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. Denied*, 415 U.S.  
2 977 (1974).

### 3 BACKGROUND

4 On July 18, 2006, Plaintiff requested from all Defendants requests under FOIA for  
5 records related to discussions, meetings and conferences related to California's regulation of  
6 motor vehicle carbon monoxide emission and preemption of such regulation. (*See* Complaint at  
7 ¶¶ 8-10.) On April 11, 2007, after exhausting its administrative remedies, Plaintiff filed this  
8 lawsuit to enforce its rights under FOIA. The parties dispute whether Defendants have  
9 adequately and timely complied with Plaintiff's FOIA request. Defendants have provided  
10 numerous responsive documents, some with redactions, and have withheld numerous  
11 documents claiming exemption under FOIA. Defendants have, however, failed to provide a  
12 detailed justification of the bases for the exemptions claimed, whether by index or otherwise.  
13 This failure has prompted the filing of the current motion. Although Defendants concede they  
14 should but have not yet produced such an index, they contend Plaintiff's request is premature  
15 and overbroad.

### 16 ANALYSIS

17 FOIA creates a presumption in favor of disclosure of government documents.  
18 *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). A governmental agency  
19 may withhold a particular document "only if the information contained in the document falls  
20 within one of the nine statutory exemptions to the disclosure requirements set forth in [5  
21 U.S.C.] § 552(b)." *Bowen v. U.S. Food and Drug Admin.*, 925 F.2d 1225, 1226 (9th Cir. 1991)  
22 (emphasis in original). The exemptions are strictly construed and when an agency refuses to  
23 disclose any particular documents, the burden is on the agency to demonstrate that a FOIA  
24 exemption applies. *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 960 F.2d 105, 107 (9th Cir.  
25 1992); 5 U.S.C. § 552(a)(4)(B); *Bowen*, 925 F.2d at 1226.

26 Ordinarily, the rules of discovery give each party access to the evidence upon which the  
27 court will rely in resolving the dispute between them. Unlike ordinary civil cases, in a FOIA  
28 case the requester generally lacks the ability to challenge the agency's assertions of exemption.

1 “The party requesting disclosure must rely upon his adversary’s representations as to the  
2 material withheld, and the court is deprived of the benefit of informed advocacy to draw its  
3 attention to the weaknesses in the withholding agency’s arguments.” *Wiener v. Federal Bureau*  
4 *of Investigation*, 943 F.2d 972, 977 (9th Cir. 1991). This lack of knowledge and power distorts  
5 the traditional adversary process, and skews the process in favor of the government. *Vaughn*,  
6 484 F.3d at 824. “In recognition of this problem, government agencies seeking to withhold  
7 documents requested under the FOIA have been required to supply the opposing party and the  
8 court with a ‘*Vaughn* index,’ identifying each document withheld, the statutory exemption  
9 claim, and a particularized explanation of how disclosure of the particular document would  
10 damage the interest protected by the claimed exemption.” *Id.* (citations omitted). “The purpose  
11 of the index is to ‘afford the FOIA requester a meaningful opportunity to contest, and the  
12 district court an adequate foundation to review, the soundness of the withholding.’” *Wiener*, 943  
13 F.2d at 977, citing *King v. Dept. of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987).

14 There is no dispute that a *Vaughn* index is necessary in this case or that the Defendant  
15 governmental agencies should provide one. However, the parties dispute the appropriate timing  
16 of the production of the index and its scope. With regard to the timing of the production of the  
17 index, there is some authority for the position maintained by the Defendants in this action that  
18 courts have only required a *Vaughn* index be produced at the time of the government’s filing of  
19 its motion for summary judgment. *See, e.g., Stimac v. U.S. Dept. of Justice*, 620 F. Supp. 212,  
20 213 (D.C.D.C. 1985) (“the preparation of a *Vaughn* index would be premature before the filing  
21 of dispositive motions”); *see also Miscavige v. Internal Revenue Service*, 2 F.3d 366, 369 (11th  
22 Cir. 1993) (FOIA cases generally should be handled on motions for summary judgment and  
23 “plaintiff’s early attempt in litigation of this kind to obtain a *Vaughn* Index and to take  
24 discovery depositions is inappropriate until the government has first had the chance to provide  
25 the court with the information necessary to make a decision on the applicable exemptions.”).

26 However, considering the amount of time that has passed between the current motion  
27 and the initial FOIA request, and the fact that the Defendants maintain they have already  
28 produced responsive, non-exempt, documents over the interim thirteen months, the Court is

1 persuaded by authority to the contrary. In light of both the passage of time since the initial  
2 request and the purpose of the *Vaughn* index to educate both the requester and the Court, the  
3 Court finds it would be unfair to allow the Defendants months to prepare their case and then  
4 force Plaintiff to formulate its entire case within the two weeks it has to respond to the motion.  
5 *See Providence Journal Co. v. U.S. Dept. of the Army*, 769 F. Supp. 67, 69 (D. R.I. 1991)  
6 (holding that the *Stimac* court and other courts allowing production of *Vaughn* index at the time  
7 of the government's filing of dispositive motions state no rule and other courts have not  
8 followed the same procedure, citing a number of cases to the contrary); *see also Wiener*, 943  
9 F.2d at 977-78 (the "purpose of the index is to afford the FOIA requester a meaningful  
10 opportunity to contest, and the district court an adequate foundation to review, the soundness of  
11 the withholding. The index thus functions to restore the adversary process to some extent, and  
12 to permit more effective judicial review of the agency's decision.") (citations and internal  
13 quotation marks omitted); *see also Coastal States Gas Corp. v. Department of Energy*, 644 F.2d  
14 969, 972 (3d Cir. 1981) (the FOIA statute embodies a policy of expedited handling of requests  
15 for documents).

16 Accordingly, the Court GRANTS Plaintiff's motion for the production of a *Vaughn*  
17 index. All defendants with the exception of the Department of Transportation shall produce  
18 their *Vaughn* indices by no later than September 28, 2007. The Department of Transportation  
19 shall have until October 10, 2007 to produce its index.

20 With reference to the scope of the index, Defendants contend that Plaintiff's request that  
21 the index include "a specific claimed injury to defendant[s]" and an explanation "why the  
22 public interest does not favor disclosure" for each document exempt from disclosure is  
23 overbroad and not required under Ninth Circuit precedent. The defendant agencies are required  
24 to do more than merely indicate that the withheld documents are of a type or category that are  
25 generally excludable. Rather, the agency must describe "*each* document or portion thereof  
26 withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-  
27 after information." *King*, 830 F.2d at 224 (emphasis in original). Categorical description of  
28 redacted material coupled with indication of anticipated consequences of disclosures is clearly

1 inadequate.” *Id.* “Specificity is the defining requirement of the *Vaughn* index.” *Id.* “Unless  
2 the agency discloses ‘as much information as possible without thwarting the [claimed]  
3 exemption’s purposes,’ the adversarial process is necessarily compromised.” *Wiener*, 943 F.2d  
4 at 979, quoting *King*, 830 F.2d at 224. The “purpose of the index is not merely to inform the  
5 requester of the agency’s conclusion that a particular document is exempt from disclosure under  
6 one or more of the statutory exemptions, but to afford the requester an opportunity to  
7 intelligently advocate release of the withheld documents and to afford the court an opportunity  
8 to intelligently judge the contest.” *Wiener*, 943 F.2d at 979. The index requires the  
9 identification of each document withheld, the statutory exemption claimed, and an explanation  
10 of how disclosure would damage the interest protected. *Schiffer v. Federal Bureau of*  
11 *Investigation*, 78 F.3d 1405, 1408 (9th Cir. 1996).

12 Accordingly, the Court ORDERS Defendants to produce a *Vaughn* index with sufficient  
13 specificity to comply with clear Ninth Circuit precedent. The parties agreed to the scope of the  
14 index at the oral argument on this motion. To the extent there is a dispute between the parties  
15 regarding the level of specificity in the description of each claimed exemption, the Court will  
16 address that dispute as it arises.

17 In addition, as discussed at the hearing on this motion, the parties shall meet and confer  
18 to devise a briefing schedule for cross-motions for summary judgment, providing that only four  
19 briefs are filed. The hearing on the motions shall be set for Friday, January 18, 2008 at 9:00  
20 a.m. One party shall file its opening summary judgment motion by November 2, 2007. The  
21 other party shall file its opposition and cross-motion by November 16, 2007. The reply and  
22 opposition to the cross-motion shall be filed by November 30, 2007. The reply in support of the  
23 cross-motion shall be filed by December 14, 2007.

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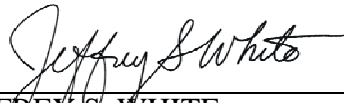
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1 If the Court determines that the matter is suitable for resolution without oral argument, it  
2 will so advise the parties in advance of the hearing date. If the parties wish to modify this  
3 schedule, they may submit for the Court's consideration a stipulation and proposed order  
4 demonstrating good cause for any modification requested.

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6 **IT IS SO ORDERED.**

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8 Dated: August 27, 2007

  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE